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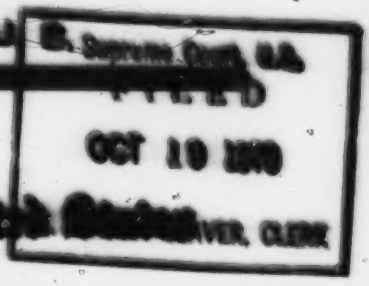

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 8721

RAILWAY LABOR EXECUTIVES' ASSOCIATION, FRANK CARTHY, ET AL., *Petitioners*,

v.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Railway Labor Executives' Association, Brotherhood of Maintenance of Way Employes, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes, United Transportation Union (the Employees or the Association),[1] Frank Carthy and other individuals sim-

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[1] The Association is an unincorporated voluntary association composed of the chief executive officers of most of the standard railway labor organizations representing employees on the Railway and most other railroads in the country. See *RLEA v. United States*, 355 U.S. 141. Throughout the proceedings below and until oral argument to the Court of Appeals, the chief executives of the three individually named railway labor organizations were members of the Association and thereby parties to this action. Before oral argument they withdrew from membership in the Association. They appeared jointly with the Association thereafter in the Court below and they appear jointly with the Association as petitioners to this Court.

ilarly employed[1] by the respondent, The Atchison, Topeka & Santa Fe Railway Company (Santa Fe or the railroad), respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 23, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto. The opinion of the District Court appears in Appendix B hereto.

JURISDICTION

The judgment (Appendix A) of the Court of Appeals was filed on June 23, 1970. A petition for rehearing timely filed was denied on July 21, 1970 (Appendix C), and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether an action brought by railway employees to recover for damages resulting from a partial termination of rail operations by their employer in violation of a Federal statute may properly be denominated a "minor labor dispute" so as to require resort for relief by claimants to the National Railroad Adjustment Board (Adjustment Board).

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[1] The action before the U. S. District Court for the Central District of California was initiated by Carthy and other employees of the Santa Fe similarly situated as members of the class for whom the action was brought. RLEA subsequently was permitted to intervene, 29 U.S.C.A. 17(11).

STATUTORY PROVISIONS INVOLVED

The action involves provisions of Sections 8, 9, and 13a(1) of the Interstate Commerce Act as amended, 49 U.S.C. 8, 9, and 13a(1), and Section 3, First (i) of the Railway Labor Act, 45 U.S.C. 153, First (i). The provisions of these statutes are set forth in Appendix D hereto.

STATEMENT OF THE CASE

Jurisdiction of the District Court was invoked on November 6, 1967, because of a question arising under a law relating to commerce, the Interstate Commerce Act.

Santa Fe, desiring to discontinue operations of its passenger trains numbered 3 and 4, operating daily (in various sections) between Kansas City, Missouri, and Gallup, New Mexico, and passenger trains numbered 7 and 8, operating daily (in various sections) between Chicago, Illinois, and Los Angeles, California, availed itself of the provisions of section 13a(1) of the Interstate Commerce Act (I.C. Act) and on October 10, 1967, filed and published notices as required by section 13a(1), that upon expiration of the statutory required notice period of thirty (30) days, or at 12:01 a.m., November 9, 1967, it would discontinue operations of the involved trains. On October 19, and 20, 1967, or some twenty (20) days prior to the expiration of the required notice period, Santa Fe summarily discontinued the operations of the involved trains at points along their described routes. The efforts of the Association to have the Commission require restoration of the service were unavailing even though the Commission recognized that Santa Fe had violated the law.

The Commission gave as its reason that the discontinuance of the involved trains by Santa Fe prior

to the expiration of the 30-day period was a breach of its own notice and of the provisions of Section 13a (1) and, "therefore vitiates our jurisdiction in this matter." The Commission thereupon ordered the "dismissal" of notice of discontinuance filed by Santa Fe.[3]

On November 6, 1967, employees of the Santa Fe on their behalf and on behalf of other employees similarly situated filed a complaint with the District Court seeking an order to require the Santa Fe to reinstate service of the involved trains and to compensate for damages suffered by the employees because of the unlawful discontinuances. The District Court refused to issue an order to require restoration of the operations of the trains, and the action continued seeking damages alone. The Association was thereafter permitted to intervene as a party plaintiff.

The District Court entered its findings of fact and conclusions of law (Appendix B) and judgment on

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[3] Approximately 3 weeks after the filing of the complaint the Committee on Commerce of the U. S. Senate in Report No. 824 to accompany Senate Bill S. 2711 described the purpose of the bill as "being designed to close a jurisdictional loophole in Section 13a(1) created as a result of a recent ICC decision involving the removal of certain Santa Fe Railway Co. interstate passenger service." The Senate Committee on Commerce recognized the uniqueness of the action by the Santa Fe and commented:

> "In all of the proceedings under section 13a(1) since its 1958 enactment, with one exception, the public was given 30 days' notice before passenger train service was discontinued. The plain language of section 13a(1) guarantees to the public 30 days' notice before train service changes by a carrier availing itself of the provisions of this section. The one exception since 1958 is the recent action by the Santa Fe Railway Co. in removing four of its passenger trains from service prior to the expiration of the statutory 30 days' period."

January 14, 1969, dismissing the action, holding that the plaintiffs had no legal standing to assert violations of Section 13a(1), and that any relief available to the plaintiffs would be by recourse to the National Railroad Adjustment Board.[4]

On June 23, 1970, the Court of Appeals issued its opinion Appendix A and "without determining the controversy",—the lawfulness of Santa Fe's action in discontinuing the involved trains—affirmed the judgment of the District Court that the controversy between the Santa Fe and its employees was a "labor dispute" and "properly cognizable" by the Adjustment Board.

REASONS FOR GRANTING WRIT

1. The Decision Below Is in Conflict With Prior Decisions of Other Courts of Appeal and This Court as to the Jurisdiction of the National Railroad Adjustment Board.

The decision of the Court of Appeals is predicated upon the erroneous premise that the relationship between the parties, and/or the nature of the relief sought, and not the issues framed by the pleadings, determines the forum in which the validity of a claim is to be adjudicated. Finding the dispute to involve claims for money damages by employees against their railroad employer with whom they were "linked by bargaining agreements", the Court below classified the controversy a "labor dispute", thus enabling it to avoid adjudication of the issue presented by relying

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[4] The District Court ruled that the benefits of Section 13a(1) were "limited to the traveling and shipping public", and did not "enure to the benefit of the employees of railroad carriers", and that the claims of plaintiffs represented a "grievance" arising out of the employment relationship between Santa Fe and its employees, "exclusively referable to the National Railroad Adjustment Board under the provisions of the Railway Labor Act . . . ."

upon the doctrine that the Railway Labor Act, 45 U.S.C. 151 et seq., furnishes the exclusive procedures for the settlement of labor disputes. *Elgin J. & E. Ry. Co.* v. *Burley*, 325 U.S. 711; *Bro. R. Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U.S. 30; *Union Pacific* v. *Price*, 360 U.S. 601; *Bro. Loco. Eng.* v. *L&N R. Co.*, 373 U.S. 33.

Applying the principles of the above familiar cases describing the dichotomy for the resolution of labor disputes, the Court reasoned that because the dispute was not one in which the employees sought to obtain *new* contract rights or to change *old* contract rights so as to present a "major" labor dispute for handling by the National Mediation Board, the controversy must be a "minor" labor dispute cognizable solely by the Adjustment Board.

The decision of the lower Court is unarguably correct *if* the instant dispute is properly classed as a "minor" dispute within the meaning of that term in railway labor adjudications. We do not dispute that the provisions of Section 3 of the Railway Labor Act, 45 U.S.C. 153, require minor disputes to be handled in the usual manner on the property of the railroad, and provide for final adjudication by the appropriate division of the Adjustment Board.

We *do* dispute that the controversy here involved is properly denominated a "minor" dispute so as to require or even permit its settlement by the Adjustment Board.

Perusal of the judicial interpretations of the Railway Labor Act will disclose that not *all* disputes that arise between a railroad and its employees are required

to be referred to the Adjustment Board. We have referred earlier herein to the differing procedures providing for the resolution of "major" disputes involving the negotiation of new contracts or changes in existing agreements.

The continued vitality of *Slocum*, *Koppal*, and *Walker*[5] is recognition that a grievance asserting an unlawful discharge is not "exclusively referable" to the Adjustment Board, and a state court action for damages for breach of contract may be brought except where state law requires prior exhaustion of administrative remedies. *Slagley* v. *Illinois Central*, (7th Cir. 1968), 397 F.2d 546; *Rosen* v. *Eastern A. L., Inc.*, (5th Cir. 1968), 400 F.2d 462, cert. den. 394 U.S. 959; reh. den. 395 U.S. 917.

Jurisdiction otherwise exists in the Federal District Courts separate from sections 1331 and 1337 of the Judicial Code, 28 U.S.C. 1331, 1337 to undertake settlement of other types of "labor disputes" between employees and their employers subject to the Railway Labor Act. Such disputes may be where a veteran sues his air carrier employer under the provisions of the Universal Military Training and Service Act, 50 U.S.C. App. Sec. 459, to obtain seniority rights provided in his collective bargaining agreement,[6] or where Pullman porters (as the Employees here did) sue for damages under Sections 8 and 9 of the Interstate Commerce Act, 49 U.S.C. 8 & 9, because of a

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[5] *Slocum* v. *Delaware L. & W. R. Co.*, 339 U.S. 239; *Transcontinental & Western Air., Inc.* v. *Koppal*, 345 U.S. 653; *Walker* v. *Southern Ry. Co.*, 385 U.S. 196.

[6] *Moe* v. *Eastern Air Lines, Inc.*, (5th Cir. 1957) 246 F.2d 215.

violation by their employer of provisions of the Interstate Commerce Act.[7]

These cases illustrate that the nature of the dispute, not the relationship of the parties or the remedy sought, determines the proper tribunal for settlement of a labor dispute. "Subject matter jurisdiction seldom depends on the relief sought. The caboose does not run the train."[8]

The failure of the Court below to perceive the marked difference between the issue here presented, and the issues presented in the familiar "contract-dispute" line of cases—the "minor" disputes referable to the Adjustment Board—led it to its erroneous judgment. The instant case is shown not to arise out of the familiar contract-dispute pattern, but to have resulted from a violation of a Federal statute.

The decision of the Court of Appeals in *United Workers of S.I.U.* v. *Galveston Wharves,* (5th Cir. 1968), 400 F.2d 320, cert. den., 395 U.S. 905, which is in direct conflict with the decision of the Court below, explains the significant differences between the familiar "contract-dispute" cases, or "minor" disputes as to which procedures of the Railway Labor Act including resort to the Adjustment Board are mandatory, and a dispute such as that presented here.

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[7] *Brogan et al.* v. *The Pennsylvania R. Co., et al.* (ND Ill. 1962), 211 F.Supp. 881, 886 (18 & 19); *See Louisville & Nashville Ry. Co.* v. *Scott,* 219 U.S. 186, 209; *Williams* v. *Jacksonville Terminal Co.,* 315 U.S. 386, 408; *Arnold* v. *L&N Ry. Co.,* (MD Tenn. 1960) 180 F.Supp. 429, 434, affirmed *sub nom. Batts* v. *L&N Ry. Co.,* (6th Cir. 1963) 316 F.2d 22.

[8] *Mungin* v. *Florida E. Coast R. Co.,* (5th Cir. 1969) 416 F.2d 1169, 1175.

In *Galveston Wharves* the Court in reversing a District Court ruling that a claim by railway employees for backpay as damages resulting from violation by their employer of a federal statute was "properly cognizable" by the Adjustment Board, held that the District Court alone possessed jurisdiction to entertain the action and determine the amount of damages to be awarded. The Court held (p. 327):

> [t]he employees here do *not* claim backpay for a breach of contract. Their claim arises out of a violation of the federal statute. The contract-dispute cases therefore are not relevant (emphasis by the Court).

The Court specifically held that there is no traditional "minor" dispute involved where damages in the nature of backpay are sought by railway employees for violation of a Federal statute by their employer—*even where the Federal statute violated by the employer was the Railway Labor Act.* The Court ruled (p. 327):

> [a] minor dispute is not involved. This is not a grievance dispute, nor a matter of interpretation or application of a collective bargaining agreement. These are the issues over which the adjustment board has exclusive jurisdiction under the terms of the statute.[9]

The decision in *Mungin* v. *Florida East Coast Ry. Co.* (5th Cir. 1969), 416 F.2d 1169, by the same Court

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[9] See *NLRB* v. *International L. Assoc.*, (4th Cir. 1964), 332 F.2d 992, 995, where the court in reliance on the definition of a "labor dispute" as set forth in the National Labor Relations Act, 29 U.S.C. 152(g) [constituting a paraphrasis of a similar definition in the Norris-LaGuardia Act, 29 U.S.C. 133(c)], held that the dispute before it was not a controversy grounded in "terms and conditions" of employment and as such not a "labor dispute": as the "law defines it."

adds further support for the distinctions expressed in *Galveston Wharves*. *Mungin* and other employees of the Florida East Coast had sought backpay as damages incurred when they lost their jobs because of the unilateral unlawful action of their employer in changing the terms and working conditions of their employment in violation of Section 6 of the Railway Labor Act, 45 U.S.C. 156.

The Court commented (p. 1177):

> In *Galveston Wharves III* we reversed the Trial Court's third holding that, in effect, the back wages portion of the relief was a pure contract claim which called for Railway Adjustment Board processing . . . . We held that the Federal Court "has authority to require back pay as a sanction for the Carrier having violated Section 6" of the Act. . . .

The Court below committed the same error by its analysis that the claim of the Employees here was for damages resulting from a violation of their bargaining agreement, rather than because of damages resulting from their employer's violation of the I.C. Act.

Most of the authorities relied upon by the Court below relate to the principle, accepted here, that a "minor" dispute as that type of controversy is established in railway labor law is referable to the Adjustment Board. *Missouri-Kansas-Texas RR.* v. *Bro. R. Trainmen* (5th Cir. 1965), 342 F.2d 298, relied upon by the Court below is of doubtful relevance in view of the subsequent decisions in *Galveston Wharves* and *Mungin* from the same Court, and, in any event, is clearly distinguishable because it did not involve a violation of a federal statute.

2. The Decision of the Court Below Unlawfully Deprives Railway Employees of Reasonable Access to the Courts for Vindication of Important Rights Secured to Them by Federal Statutes.

The right of a rail carrier unilaterally to change the working conditions of its employees by the abandonment of rail lines, the consolidation of facilities, or the discontinuance of passenger train operations, is permitted under Federal law, when the procedures provided by the I.C. Act are resorted and adhered to by rail carriers seeking to consummate such transactions.

Conversely, there is no right given a rail carrier unilaterally to undertake to so modify or change its operations unless the requirements of applicable Federal statutes are met, be they the requirements of Section 6 of the Railway Labor Act,[10] 45 U.S.C. 156, Sections 1(18)-(22) of the I.C. Act, 49 U.S.C. 1(18)-(22), Section 5, or Section 13(a)1 of the same Act, 49 U.S.C. 5 and 13(a)1.[11]

These provisions of the I.C. Act prohibiting such transactions unless there is strict adherence to statutorially prescribed procedures, directly provide for the stability of employment of railroad workers.[12]

The decision of the Court below will deprive a railway employee of the opportunity to obtain *judicial* inquiry into the lawfulness of acts by his employer which are contended to fail to comply with the re-

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[10] *United Indust. Wkrs. of S. I. U.* v. *Galveston Wharves*, (5th Cir. 1965), 351 F.2d 183; *Mungin* v. *Florida East Coast*, *supra*.

[11] Note 7, *supra*.

[12] See *United States* v. *Lowden*, 308 U.S. 225; *Interstate Com-Comm.* v. *RLEA*, 315 U.S. 373, 377; *RLEA* v. *United States*, 339 U.S. 142.

quirements of such federal statutes contrary to the provisions of Sections 8 & 9 of the I.C. Act, 49 U.S.C. 8 and 9, and Section 1331, and 1337 of the Judicial Code, 28 U.S.C. 1331 and 1337.

As their legislative history shows,[13] the 1966 amendments to the Railway Labor Act[14] were intended by Congress to eliminate any remaining doubt as to the finality of decisions by the Adjustment Board in the settlement of minor disputes.[15] The Act as amended clearly shows that the findings and orders of the Adjustment Board in the resolution of minor disputes "shall be conclusive on the parties."

The Court below was not disturbed by the fact that the Adjustment Board would be required to decide whether Santa Fe had violated a provision of the Interstate Commerce Act, because it "anticipated" that the Board would interpret much more: "past bargaining history, current industry practices, and the effect of the ruling upon future bargaining in the industry as a whole."[16]

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[13] Senate Report No. 1201, 89th Cong., 2nd Sess. 1966, Code, Cong. and Administrative News p. 2287.

[14] Public Law 456, 89th Cong., 80 Stat. 208.

[15] The restricted measure of judicial review of the lawfulness of a Board award is set forth in Section 3, First (p) and (q) of the Act, 45 U.S.C. 153, First (p) and (q). See *Gunther* v. *San Diego & Arizona E. R. Co.*, 382 U.S. 257.

[16] It is difficult to understand how "interpretations" of this nature by any tribunal have any relevancy to a decision of the clear-cut question presented: Whether Santa Fe complied with the 30-day notice provisions of Section 13a(1)?

Whatever expertise the Adjustment Board may possess with respect to the settlement of disputes arising out of the interpretation and application of the provisions of collective bargaining agreements, its members are not equally equipped to undertake the judicial determination whether a federal statute has been violated. The delegation of such authority to the Adjustment Board is incomprehensible when as shown the Board's decision thereon would not be subject to judicial review.

The decision of the Court below will therefore deprive railway employees of the right to obtain judicial determination of the lawfulness of the actions by their employers contended to be in violation of specific Federal statutes regulating the operations of their employers and thus the conditions of their employment. Clearly, the issue presented is of substantial importance in railway labor relations.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23,908

RAILWAY LABOR EXECUTIVES ASSOCIATION, an unincorporated association; FRANK CARTHY; R. W. KROLL; W. A. STYMUS; F. E. HOLDEN; R. M. HESTER; J. R. BOND; W. COMSTOCK; and P. I. JENSEN, on their own behalf and on the behalf of all others similarly situated,
Plaintiffs-Appellants

v.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Defendant-Appellee.

[June 23, 1970]

Appeal from the United States District Court
for the Central District of California

Before: ELY and WRIGHT, Circuit Judges, and JAMESON,* District Judge.

WRIGHT, Circuit Judge:

Appellant railway employees seek damages for loss of work resulting from the discontinuance of four interstate trains by their employer. They allege that the discontinuance did not comply with the procedures set out in Section 13a of the Interstate Commerce Act, 72 Stat. 571 (1958), 49 U.S.C. § 13a (1964).[1] Without determining its lawfulness,

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* Honorable William J. Jameson, United States Senior District Judge, Billings, Montana, sitting by designation.

[1] Section 13a, in brief, permits a railway carrier, desirous of discontinuing an interstate train route, to avoid the jurisdiction of state laws and regulatory agencies by filing a 30-day notice with, and securing the approval of, the Interstate Commerce Commission. The section also requires the posting of a notice of the proposed discontinuance in facilities served by the train "at least thirty days in advance of any such proposed discontinuance or change."

we affirm the judgment of the district court, holding that this dispute between the railroad and its employees is properly cognizable by the National Railroad Adjustment Board under provisions of the Railway Labor Act, 45 U.S.C. §§ 515-62.

On October 10, 1967, the defendant railroad filed with the Interstate Commerce Commission a statement of its intention to discontinue service on two trains running between Chicago and Los Angeles and two others running between Kansas City, Missouri, and Gallup, New Mexico. As required by Section 13a, notices were posted in the affected stations advising the public that operations would cease at midnight on November 10, 1967.

But on October 19, 1967, when the Interstate Commerce Commission notified the railroad that it would not investigate, and hence would not oppose, the proposed discontinuances, the railroad immediately cancelled the trains involved, twenty days prior to the date stated in the posted notices. Attempts by the plaintiff union to have the ICC restore the service proved unsuccessful and this class action was brought on behalf of the displaced employees. As amended, the complaint sought compensatory and punitive damages for the affected employees caused by the premature discontinuance. The district court denied relief.

It is conceded that this dispute is between a railroad and its employees, and that the two are linked by collective bargaining agreements. It is also undisputed that this is a "minor dispute" in the sense that "the claim is to rights accrued, not merely to have new ones created for the future." *Elgin, Joliet & Eastern Ry* v. *Burley*, 325 U.S. 711, 723 (1945).

Hence, the narrow question before us is whether the quarrel is one "growing out of grievances or out of the interpretation or application of [existing] agreements." If so, it must go first to conference and negotiation and, failing that, to possible arbitration before the National Railroad Adjustment Board. Railway Labor Act § 3, First (i), 45 U.S.C. § 153, First (i). The statutory grievance procedure,

if applicable, is mandatory and exclusive and deprives us of the primary jurisdiction to resolve the disputed questions. *Brotherhood of Locomotive Engineers* v. *Louisville & Nashville R.R.*, 373 U.S. 33, 38 (1963).

The jurisdiction of the adjustment Board is not limited to disputes arising from provisions specifically included in a collective bargaining agreement. If the claim is founded upon some incident of the employment relationship, or an asserted one, the Board may determine the meaning and effect of the provisions of the collective agreement with reference either to an included or to an omitted case. *Elgin, Joliet & Eastern Ry.* v. *Burley, supra,* 325 U.S. at 723.

Here the collective agreements make no specific provision for the payment of wages following discontinuance of a train. However, nothing in the agreements exclude such protection for the affected employees. Whether such a provision was omitted because the parties relied on the language of the Interstate Commerce Act, the "usage, custom, and practice" of the industry, or whether it was rejected following negotiation does not appear in the record and is a matter requiring the expertise of the Adjustment Board. *Order of Ry. Conductors* v. *Pitney,* 326 U.S. 561, 567 (1946). *See* also *Transportation-Communication Employees Union* v. *Union Pacific R.R.*, 385 U.S. 157, 160-61 (1966); *Gunther* v. *San Diego & Arizona Eastern Ry.*, 382 U.S. 257, 260-62 (1965). *Cf.*, Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1 (1958).

A similar situation was presented in *Missouri-Kansas-Texas R.R.* v. *Brotherhood of Railroad Trainmen*, 342 F.2d 298 (5th Cir. 1965). The Brotherhood called a strike over the Railroad's failure to correct hazardous and unsafe conditions. The court held that the dispute was properly referable to the Adjustment Board despite the silence of the collective bargaining agreement as to any terms governing unsafe working conditions.

The employees seek to characterize this action as a "tort action" for violation of a statutory duty and, therefore, not referable to the Adjustment Board. But the provisions of

the Railway Labor Act relate to matters of substance, not form. *See Switchmen's Union of North America* v. *Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968). Where, as here, the dispute grows out of the employment relationship and, in the final analysis, involves an attempt to impose a right which is incident to that relationship, the statutory forum is the Adjustment Board, absent a clear expression of legislative policy to the contrary.

We do not think that the policies behind enforcement of Section 13a of the Interstate Commerce Act were intended to outweigh the single forum provisions of the Railway Labor Act. *Cf. Moe* v. *Eastern Air Lines, Inc.*, 246 F.2d 215 (5th Cir. 1957). Insofar as displaced employees are concerned, it is, at best, conjectural that Congress intended to confer upon them additional labor security rights independent of the collective bargaining agreement. And to hold that a railroad employer-employee dispute over rights asserted under the Interstate Commerce Act is outside the provisions of the Railway Labor Act would be directly contrary to the holding in *Order of Railroad Telegraphers* v. *Chicago & North Western Ry.*, 362 U.S. 330 (1960).

In *Railroad Telegraphers* the employer sought to avoid application of the Railway Labor Act by contending that the discontinuance of railroad stations was entrusted, by law, to state agencies. Required bargaining over job security, it was alleged, would subvert the authority of those agencies and would be contrary to transportation policies of the Interstate Commerce Act. The Court rejected these contentions, holding that the security, seniority, and stability of railroad jobs were proper subjects of collective bargaining.

It is true, as the employees contend, that the effect of our holding may require, to some degree, the interpretation of Section 13a by the Adjustment Board. But it will also involve the interpretation of much more, including past bargaining history, current industry practices, and the effect of the ruling upon future bargaining in the industry as a whole. These are matters entrusted to the Arbitration Board and we conclude that the district court correctly dis-

missed the suit for the employees' failure to exhaust those procedures.

Affirmed.

ELY, Circuit Judge (Concurring):

While I concur in the majority opinion, I note my disapproval of the appellee's noncompliance with section 13a of the Interstate Commerce Act. Choosing to effectuate discontinuance of its service under federal procedure, it bypassed state laws which would have imposed a longer delay than the relatively short period prescribed by Congress. Having thus invoked the federal law to its advantage, it should not, in my judgment, have terminated the service short of the expiration of the time prescribed by the federal statute. I think it clear that the appellee disregarded the law, and had relief been sought by parties to whom another avenue was unavailable, the appellee's position would hardly be supportable.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23,908

Judgment

APPEAL from the United States District Court for the Central District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed, with costs in this Court in favor of the appellee and against the appellants.

Costs:

Brief of appellee: $341.37

Filed and entered June 23, 1970

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 67-1618-F

[Filed Jan. 14, 1969]

RAILWAY LABOR EXECUTIVES ASSOCIATION, an unincorporated association; FRANK CARTHY, ET AL., *Plaintiffs*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Defendant*

JOHN J. BALLUFF, ROBERT B. CURTISS, MATTHEW H. WITTEMAN, HENRY M. MOFFAT, RICHARD K. KNOWLTON, FREDERICK G. PFROMMER, DONALD W. RICKETTS, 448 Santa Fe Building, 121 East Sixth Street, Los Angeles, CA 90012 628-0111—Attorneys for Defendant.

Findings of Fact and Conclusions of Law

This action having been tried upon the agreed statement of facts of the parties hereto, as amended, by the court without a jury, the court, having heard the evidence and considered the written and oral arguments of the parties, hereby finds the facts and states separately the conclusions of law thereon and directs the entry of the appropriate judgment as follows:

FINDINGS OF FACT

The court finds as its findings of fact all the facts set forth in the Agreed Statement of Facts herein dated September 9, 1968, as amended by Amendment to Agreed Statement of Facts dated October 21, 1968.

CONCLUSIONS OF LAW

Upon the foregoing findings of fact the court concludes as follows:

Counts I and II

I

In discontinuing the operation of Trains 3, 4, 7 and 8 on or about October 19 and October 20, 1967, defendant did not violate 49 U.S.C. § 13 (a)(1), such statute being permissive in nature, defendant having the option of either proceeding under said statute or under the applicable state statutes and regulations, the effect of defendant's action in discontinuing said operations being to vitiate the jurisdiction of the Interstate Commerce Commission after it had originally invoked such jurisdiction by filing notices as contemplated by said statute.

II

Plaintiffs, being affected employees of defendant and a railway labor association representing such employees, had no legal standing to assert the alleged violation of said federal statute because the benefits of said statute are limited to the traveling and shipping public and do not enure to the benefit of employees of railroad carriers subject to said statute.

III

Plaintiffs' complaint represents a grievance arising out of the employment relationship between the individual plaintiffs and defendant which is exclusively referable to the National Railroad Adjustment Board under the provisions of the Railway Labor Act (45 U.S.C. § 153 et ff.)

Counts III and IV

IV

The requisite diversity of citizenship is not present to confer jurisdiction upon this court over Counts III and IV of said complaint.

V

There is no pendent jurisdiction of this court over Counts III and IV because said counts embrace a separate and distinct cause of action which is not the same as the alleged federal cause of action asserted in Counts I and II and because the court concludes that there is no cause of action in plaintiffs based upon said federal law.

VI

If the court could, in its discretion, entertain Counts III and IV on the basis of pendent jurisdiction it declines to entertain such counts as being predicated solely upon state law and which should be determined by the court of the State of California.

VII

Judgment should be entered in favor of defendant on the merits as to Counts I and II and in favor of defendant as to Counts III and IV without prejudice to plaintiffs' right to file a separate state court action on said Counts III and IV.

IT IS SO ORDERED and counsel for defendant shall submit an appropriate judgment in accordance herewith.

DATED: Jan. 14, 1969

ALAN J. FERGUSON
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, July 21st, 1970

Before: ELY and WRIGHT, Circuit Judges, and JAMESON, District Judge

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellants filed July 7, 1970 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX D

Section 8. Interstate Commerce Act [49 U.S.C. § 8]

"That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Section 9. Interstate Commerce Act [49 U.S.C. § 9]

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this part may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their

own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this part, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

Section 13a(1). Interstate Commerce Act [49 U.S.C. § 13a(1)]

"(1) A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby,

notice at least thirty days in advance of any such proposed discontinuance or change.

The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pendency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an order by the

Commission after such investigation requiring the continuance or restoration of operation or service, jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers."

Section 3. First (i), Railway Labor Act [45 U.S.C. 153. First (i)]

The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

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IN THE

Supreme Court of the United States

October Term, 1970
No. 872

RAILWAY LABOR EXECUTIVES' ASSOCIATION, FRANK CARTHY, *et al.*,

Petitioners,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent The Atchison, Topeka and Santa Fe Railway Company (hereinafter sometimes called "Santa Fe") presents herewith its Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed herein by Petitioners Railway Labor Executives' Association and others.

Questions Presented.

Santa Fe does not dispute the nature of the basic question presented by the Petition for Writ of Certiorari, to wit: whether or not the dispute involved in this case is properly referrable to the National Railroad Adjustment Board, as the Court of Appeals held. Santa Fe does point out, however, that it denies that

it violated any federal statute (the District Court expressly found Santa Fe had not done so—Appendix B, p. 7 a to Petition for Writ) and that there are several grounds in support of the judgment in the District Court in this matter which were not decided by the Court of Appeals but which fully support such judgment, whether or not the dispute is properly denominated a "minor labor dispute".

REASONS FOR DENYING WRIT.

1. The Decision Below Is Not in Conflict With Prior Decisions of Other Courts of Appeals and This Court.

Petitioners assert that the decision of the Court of Appeals below is in conflict with *United Workers of SUI v. Galveston Wharves,* (5th Circuit, 1968), 400 F. 2d 320 and *Mungin v. Florida East Coast Railway Co.,* (5th Circuit, 1969) 416 F. 2d 1169. Petitioners point to no decisions of the Supreme Court as to which such a direct conflict is alleged. Both *Galveston Wharves* and *Mungin* involved a situation in which it was found that the carrier violated Sections 2 and 6 of the Railway Labor Act, 45 U.S.C. 152 and 156, by making a change in wages, hours and working conditions of railroad employees without serving so-called "Section 6 Notices" seeking to negotiate on such changes and by refusing to negotiate on such changes when the Union requested it to do so. In both cases the Court of Appeals for the 5th Circuit, in reversing District Court decisions, held that a dispute over a change in conditions was a "major dispute" (a manifestly correct conclusion), that the carrier should be required to negotiate over such changes and maintain the *status quo* pending such negotiations and that *as a sanction*

to insure the carrier's fulfillment of its obligations the District Court had jurisdiction to and should order the payment of back wages to the affected employees. In *Galveston Wharves* and *Mungin* a major dispute was involved all the way and the only question was whether or not in enforcing the carrier's obligations pending the resolution of such major dispute sanctions in the form of back wages should also be ordered. This is quite different from the present situation where the issue is whether or not employees are entitled, under existing agreements, to continued employment on the discontinued passenger trains for the duration of the thirty-day notice period, or compensation in lieu thereof.

There is no assertion by Petitioners in their complaint, proof or briefs in the Courts below that the carrier was obligated to negotiate with them before discontinuing the trains in question and it is a little late now for them to assert that this dispute is over a change in working conditions. Rather than being comparable to *Galveston Wharves* and *Mungin* the present case is, as stated by the Court of Appeals, similar to *Missouri, Kansas, Texas RR (MKT) v. Brotherhood of Railroad Trainmen,* (5th Circuit, 1965) 342 F. 2d 295, where a dispute over a railroad's alleged failure to correct hazardous conditions was held properly referrable to the Adjustment Board despite the silence of a collective bargaining agreement as to terms governing unsafe working conditions. This case, like *MKT* and unlike *Galveston Wharves* and *Mungin,* clearly involves a claim to rights accrued, not to have new ones created for the future, and represents a minor dispute (*Elgin, Joliet and Eastern Railway v. Burley,* (1945) 325 U.S. 711, 89 L. Ed. 1886, 65 S. Ct. 1282)

Santa Fe does not perceive the significance of the citation by Petitioners of *Slocum, Koppal* and *Walker*[1] and the other cases cited on pages 7 and 8 of the Petition, but points out that the cases which hold that a discharged employee may sue for damages for wrongful discharge (a right narrowly limited by *Koppal* and others) start with the decision in the case of *Moore v. Illinois Central RR Co.*, 312 U.S. 630, 85 L. Ed. 1089, 61 S. Ct. 754, which held that where an employee has been discharged he may treat his employment relationship as having been terminated and elect to sue for damages for a wrongful discharge. These cases consequently provide no precedent for an action for damages by employees who are still employees. The present case does not involve a wrongful discharge.

Other cases cited by Petitioners either have no relevance or involve situations where the applicable statute expressly provides for a damage action in the federal court, as in the case of an action to recover unpaid minimum wages under the Fair Labor Standards Act (*Williamson v. Jacksonville Terminal Co.*, 315 U.S. 386).

What the employees sought in this action was compensation in lieu of continued employment throughout the 30 day period of the notices. Whether or not they were entitled to such continued employment or compensation—either as express or as implied rights under the bargaining agreements—is a matter which the Adjustment Board is qualified to and should determine. The decision might well, as suggested by the Court of Appeals, involve looking into usage, custom and practices of the industry. It did not necessarily involve a le-

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[1]*Slocum v. Delaware L. & W. R. Co.*, 339 U.S. 239; *Transcontinental & Western Air., Inc. v. Koppal*, 345 U.S. 653; *Walker v. Southern Ry. Co.*, 385 U.S. 196.

gal decision as to whether or not Santa Fe had violated any mandatory obligations under the Interstate Commerce Act. To reiterate, it involved a claim to rights accrued; it did not involve a controversy over new rights (a major dispute) as in *Galveston Wharves* and *Mungin* or a claim for damages by ex-employees of the type involved in *Moore* and *Koppal.*

2. The Decision of the Court Below Did Not Deprive Railway Employees of Reasonable Access to the Courts.

The scheme of the Railway Labor Act as amended in 1966 and as evidenced by the legislative history of the Act, as conceded by Petitioners on page 12 of the Petition, is to create a finality of decisions by the Adjustment Board in the settlement of minor disputes. If this is a minor dispute, Congress has spoken clearly and unequivocally that its final resolution lies with the Adjustment Board. The complaint of Petitioners that the decision of the court below would deprive railway employees of the opportunity to obtain a judicial inquiry is answered by the incontrovertible fact that Congress intended no judicial inquiry.

The employees were not without any judicial remedy in this case, as pointed out in Santa Fe's brief in the Court of Appeals. Petitioners' real grievance is with the Interstate Commerce Commission in dismissing Santa Fe's notices and the complaints of the employees lodged with the Commission. If the Commission was wrong in this action the employees had a judicial remedy by either an attack for error before a three-judge federal court under the provisions of 28 U.S.C. §2321, *et seq.* or a mandamus action in the District of Columbia (*State of New Jersey v. United States,* (DNJ-1959) 168 F. Supp. 324 at 334).

Petitioners are incorrect in their assertion on page 11 of the Petition that §13(a)(1) of the Interstate Commerce Act directly provides for the stability of employment for railroad workers. The cases cited for this proposition in footnote 12 of the Petition relate only to Sections 1(18)—(22) and 5 of the Interstate Commerce Act. As pointed out in Respondent's brief in the Court of Appeals, §13(a)(1) does not provide for employee protection conditions and has been expressly held not to authorize the imposition of such conditions (*The Atchison, Topeka and Santa Fe Railway Co. Discontinuance of Trains*, 333 I.C.C. 569 [1968] and other Commission decisions).

3. The Decision of the District Court Is Correct for Reasons Not Considered by the Court of Appeals and in Any Event This Case Does Not Present Such a Novel and Important Issue as to Require Supreme Court Review.

Even if this Court entertains any doubt about the expressed reasons for the Court of Appeals' decision, there was ample reason for affirming the District Court judgment on grounds not directly considered by the Court of Appeals. The statute in question (§13(a)(1)) contained no mandatory provisions except that a carrier is required to comply with any orders issued by the Commission. No such orders were issued and there was no violation of anything by the Santa Fe. Furthermore, it is quite clear that §13(a)(1) did not create a right in employees to continued employment and in fact did not even authorize or permit the imposition of employment protection conditions, as above stated. Consequently if there were any violation of the Act by the carrier the only ones who could complain were the shipping and traveling public who are not parties to

this action. Additionally, even if Sections 8 and 9 of the Interstate Commerce Act otherwise provided a legal remedy to employees they did so expressly only where the employees had not elected to take their complaint to the Commission—which they did in this case. By doing so they waived any right they might otherwise have to a court action for damages.

Finally, this case arose out of a somewhat unusual set of circumstances not likely to recur and there is no compelling reason for this court to assume jurisdiction.

Conclusion.

For the reasons that there is no conflict between the decision of the Court of Appeals below and decisions of this Court or other Court of Appeals decisions, the Court of Appeals decision is manifestly correct, there are ample other reasons why the District Court judgment should be affirmed and this case clearly does not involve such important issues as to justify Supreme Court review in any event, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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